Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-893

In The

Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA,

Petitioner,

v.

CITY OF NAPA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Whether "heightened scrutiny," as set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or the more deferential "reasonable relationship" test articulated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), applies to the judicial review of a facial takings challenge to a legislatively-adopted inclusionary zoning ordinance which (1) applies to all proposed new development in the City, (2) imposes no dedication or exaction requirement, (3) restricts only a small percentage of the use of a proposed new development, (4) allows for financial incentives to offset the small restriction, and (5) allows for no administrative "leveraging" of the City's police power against individual developers.

2. Whether the California court of appeal correctly determined, based on the City's 700-page legislative record judicially noticed by the superior court without objection by Petitioner, that the City's zoning ordinance substantially advances a legitimate governmental interest in promoting affordable housing.

3. Whether the California court of appeal correctly determined that a facial constitutional challenge to an inclusionary zoning ordinance is premature when the ordinance contains numerous economic incentives and administrative relief provisions which precluded the court from determining that the ordinance cannot be constitutionally applied under any imaginable circumstance.

QUESTIONS RESTATED – Continued

4. Whether the due process concept of "fair return," previously applied only in price and rent control cases, should be applied for the first time to a land use regulation imposing use restrictions on a small percentage (ten percent) of property proposed for new residential development, and whether, assuming that a fair return standard even applies, a facial due process challenge is premature when it is impossible to determine, until the regulation actually is applied, what if any restrictions on use or future rents may be imposed.

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REASONS FOR DENYING THE WRIT

The land use ordinance at issue in this case requires all new residential developments in the City of Napa to include a small percentage (ten percent) of affordable units. Petitioner asks this Court to invalidate the Ordinance not on the basis of its application to any specific project, but on its face. Contrary to Petitioner's repeated assertions, the City's Ordinance does not require either a dedication or an exaction. Rather, it is a land use regulation which simply restricts the use of a very small percentage of a landowner's development. Nor is the Ordinance targeted to any specific development. It is a legislative enactment applying generally to all new development within the City.[1] And while Petitioner incorrectly suggests that there is conflict among state and federal courts whether the Ordinance should be reviewed under heightened or deferential scrutiny, no such conflict exists to justify certiorari under Rule 10.

To be sure, this is an important case. The affordable housing problem is of crisis proportions in California generally and in the City of Napa in particular. The City based its adoption of the Ordinance on overwhelming documentation of that crisis.[2] But the social importance of

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[1] The Ordinance applies equally to all property in the City, including commercially developed property which must pay a housing impact fee. Petitioner's Appendix ("Pet. App.") at G-18.

[2] The superior court took judicial notice, without objection by Petitioner, of nearly 700 pages of analyses, studies, and other materials considered by the City Council prior to adoption of the Ordinance. Pet. App. at A-4.

this case must be contrasted with its legal redundancy. Indeed, the central question here, the appropriate standard of review, has been the subject of three relatively recent decisions by this Court.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court established a two-pronged "heightened scrutiny" for ad hoc, adjudicative land dedication requirements imposed on an individual property owner as a condition for the issuance of a permit by a local governmental agency. More recently, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03 (1999), which is not even cited by Petitioner, this Court unanimously noted that such heightened scrutiny under *Nollan* and *Dolan* had never been applied outside the "special context" of land dedication requirements. Not once has this Court suggested, let alone held, that heightened scrutiny under *Nollan/Dolan* apply in the sweeping manner urged here by Petitioner to a legislatively-imposed, generally applicable land use regulation requiring no dedication of land to the City.

Petitioner's fallback argument, that the court of appeal failed to correctly apply even minimal scrutiny, is based upon a selective and distorted reading of the authorities and the court of appeal's opinion. Petition at 20-21. In fact, the court of appeal correctly applied the applicable standard of review articulated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Pet. App. at A-7 to A-10. The court concluded, on the basis of established judicial and legislative authority, that creating affordable housing opportunities is a legitimate state interest. *Id.* The court further concluded, on the basis of a voluminous,

undisputed, and judicially-noticed legislative record, that the Ordinance would substantially advance that interest by requiring a modest amount of affordable housing within each new development. *Id.* Moreover, the Ordinance's inclusionary requi ement was premised upon the City Council's legislative determination that new market rate residential developments exacerbate the City's affordable housing problems, not only by depleting scarce available land, but also by introducing new, more affluent residents who demand new commercial services and products which require, in turn, an influx of low-paid workers themselves requiring housing. Pet. App. at G-6 to G-9. Petitioner's threadbare (one paragraph) argument to the contrary ignores this factual finding. This Court's review under Rule 10 is unwarranted.

Petitioner's next argument, that the court of appeal incorrectly analyzed the effect of the Ordinance's waiver provision, fails for a variety of reasons. First, it sets forth no basis for certiorari under Rule 10, but merely argues that the court of appeal erred. Second, it simply ignores the established judicial preference for an individualized, fact-based resolution of constitutional claims. Consistent with that preference, since the availability of a waiver or the application of future affordability restrictions can be determined only upon application of the Ordinance, the court correctly concluded that it was impossible to determine that the Ordinance would be unconstitutional in every application. Pet. App. at A-6 to A-7, A-13 to A-14. That conclusion is neither novel nor controversial. Finally, the entire argument is largely academic since the court also ruled that, with or without a waiver process,

the Ordinance on its face satisfies *Agins'* "substantially advance" requirement.

Once again ignoring Rule 10, Petitioner's last argument is that the court of appeal erred in failing to apply a due process "fair return" standard to the Ordinance. However, the court correctly acknowledged that the fair return concept has no application to zoning regulations that merely restrict the use of land. What is more, in asserting its "fair return" approach to the Ordinance, Petitioner ignores that unlike its claim based on *Agins'* substantially advance requirement, a fair return claim by its very nature focuses on *Agins' **second*** prong – namely, the economic impact of the regulation at issue. Thus, the court of appeal correctly concluded that, in light of the Ordinance's waiver and in-lieu fee provisions, the effects of the Ordinance simply could not be evaluated for purposes of Petitioner's purely facial challenge.

For these reasons, the City respectfully requests that the Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The City presents the following Statement of the Case in response to the argumentative and misleading Statement presented by Petitioner.

I. BACKGROUND TO ADOPTION OF ORDINANCE

Petitioner does not dispute, nor could it dispute, that a housing affordability crisis exists in California. This

crisis has been well documented by commentators[3] and by the California Legislature.[4] For their part, California courts have not only acknowledged the State's affordable housing crisis,[5] they have expressly acknowledged that state and local efforts to provide affordable housing have a legitimate governmental purpose.[6] The decisions of this

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[3] *See, e.g.*, Augusta, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 Santa Clara L. Rev. 503, 503-06 (1999); Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 Hastings Const. L.Q. 1015, 1015-19 (1976); Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 Hofstra L. Rev. 539, 542-46 (1995).

[4] *See, e.g.*, Cal. Health & Safety Code §§ 33250 (West 1999), 50003-50004 (West 1996); Cal. Gov't Code §§ 11346.5, 65009, 65580, 65589.5 (West Supp. 2002), 65852.2, 65913 (West 1997). The California Legislature has adopted a plethora of other laws and programs designed to ameliorate the affordable housing crisis (*see, e.g.*, Cal. Gov't Code §§ 8698-8698.2 (West 1992), 12900-12996 (West 1992 & Supp. 2002), 65008, 65589.5 (West Supp. 2002), 65913 (West 1997), 65915-65918 (West 1997 & Supp. 2002)), and at least two legislative enactments, the Mello Act (Cal. Gov't Code § 65590 (West 1997)), and the Community Redevelopment Law (Cal. Health & Safety Code § 33413 (West 1999)), contain inclusionary requirements.

[5] *See, e.g.*, *Sounheim v. City of San Dimas*, 47 Cal. App. 4th 1181, 1184, 1188-89, 55 Cal. Rptr. 2d 290, 293-95 (1996); *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 545, 7 Cal. Rptr. 2d 848, 849 (1992).

[6] *See, e.g.*, *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 970-71, 968 P.2d 993, 1004-05, *cert. denied*, 526 U.S. 1131 (1999); *Green v. Superior Court*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173-74 (1974); *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892, 907-12, 223 Cal. Rptr. 379, 387-91 (1986); *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 873-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

Court are to the same end. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11-13 (1988).

To address the affordability crisis in Napa, the City adopted the "inclusionary" zoning ordinance, which links the construction of low and moderate income housing to the construction of market-rate housing by requiring lower income units in an otherwise market-driven development.[7] As of 1994, at least 64 California cities and counties had adopted similar inclusionary zoning ordinances.

Contrary to Petitioner's suggestion that the City adopted the Ordinance without study or evidence (Petition at 6), the Ordinance was, in fact, adopted after years of study, consideration, and input from a "broad based community group that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce." Pet.

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[7] Petitioner's suggestion (Petition at 3 n.1) that inclusionary zoning is different from zoning that restricts density or setbacks ignores the actual operation and effect of inclusionary zoning. Open space and setback requirements – clearly "zoning" – allow no use of some percentage of regulated property, without the incentives and waivers offered under Napa's Ordinance here, and yet plainly are constitutional. *Agins*, 447 U.S. at 260-63. Because inclusionary zoning similarly limits the use of a small percentage (here ten percent) of property, authorities nationwide accept it as a form of zoning. *See, e.g.*, Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urb. L.J. 23, 40-41 (1996); Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 360, 369 (Winter 1995); Padilla, *supra*, 23 Hofstra L. Rev. at 541 n.2, 551, 570 n.156, 573.

App. at A-2. Moreover, in direct contradiction to Petitioner's statement that no evidence demonstrated that new residential housing contributes to the City's need for low-income housing (Petition at 6), the City Council made numerous findings, all of which were consistent with the previously-conducted studies and analyses contained in the record before the City. The findings included, among other things, that: (1) the City Rural Urban Limit line, which denotes the limits of urban development and acts as an agricultural buffer, leads to a limited supply of available land for development; (2) new market-rate housing absorbs the remaining supply of land available for development within the Rural Urban Limit line; (3) by absorbing the remaining supply of land available for development, new market-rate housing limits the supply of affordable housing; (4) by absorbing the remaining supply of available land, new market-rate housing also increases land prices; (5) new market-rate housing further aggravates the affordable housing crisis by increasing local employment for workers who cannot afford housing in the City; (6) housing price increases already are outpacing incomes and have made housing unaffordable to low-income households; and (7) workers and long-time residents are being forced to reside outside the City due to housing costs. Pet. App. at G-6 to G-9.

II. THE ORDINANCE

Backed by the above findings, the Ordinance requires that ten percent of all new residential dwelling units be affordable. Pet. App. at G-29. However, the Ordinance gives developers of single-family units the option of satisfying the requirement by an "alternative equivalent proposal," including a dedication of land or the

construction of affordable units on another site. *Id.* at G-30 to G-31. Developers of multi-family projects also may, at their option, request relief from the Ordinance's inclusionary requirement by an alternative, if the City Council determines that the alternative results in affordable housing opportunities greater than or equal to those achieved by meeting the inclusionary requirement. *Id.*

Alternatively, a residential developer that chooses not to satisfy the inclusionary requirement may elect to pay an in-lieu fee. Developers of single-family units may choose this option by right. Developers of multi-family units are permitted the in-lieu fee alternative upon a showing of financial infeasibility and "overriding conditions impacting the project that prevent developer . . . from meeting the requirement to construct affordable units. . . ." *Id.* at G-31 to G-32. Any such fees are deposited in the Housing Trust Fund, and may only be used to increase and improve the supply of affordable housing. *Id.* at G-16.

The Ordinance also allows developers to obtain affordable housing concessions and incentives, including expedited processing, fee payment deferrals, marketing assistance, waiver of building standards having impacts on development costs, and additional density bonus incentives. *Id.* at G-33 to G-35.[8] As required under state

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[8] Petitioner's statement that the Ordinance only provides incentives if a developer *"exceeds"* the Ordinance's requirements is wrong. Petition at 5-6. The Ordinance provides that developers meeting the inclusionary requirement will receive, as a matter of right, preliminary development review, expedited processing, fee deferrals, and marketing assistance.

law, the housing density bonuses generally permit a developer to exceed the density limits in the City's zoning ordinance. *See* Cal. Gov't Code § 65915 (West Supp. 2002).[9] In addition to its "alternative equivalent" and in-lieu fee options, incentives, and concessions, the Ordinance also permits any project developer to appeal for a reduction, adjustment, or complete waiver of the inclusionary/in-lieu fee requirements based upon the absence of a reasonable relationship or nexus between the requirements and the impact of the development. Pet. App. at G-40 to G-41. Finally, the Inclusionary Ordinance applies with equal force to all development in the City, including non-residential development. The Ordinance generally requires non-residential development projects to pay a housing impact fee unless the project meets one of the Ordinance's exemptions. *Id.* at G-18 to G-19, G-21 to G-27.

Pet. App. at G-33 to G-35. Other discretionary incentives, including density bonuses and financial assistance, also are available for meeting the Ordinance's requirements. *Id.*

[9] Because such additional units are constructed on land already purchased, with infrastructure already in place, studies have concluded that developers receive more profitable returns under density bonus programs, even when the programs contain inclusionary requirements. Fox & Davis, *supra*, 3 Hastings Const. L.Q. at 1027-28; *see also* Morgan, *supra*, 44 Emory L.J. at 377.

ARGUMENT

I. THE CALIFORNIA COURT OF APPEAL CORRECTLY RULED THAT HEIGHTENED SCRUTINY UNDER *NOLLAN/DOLAN* DOES NOT APPLY TO THE ORDINANCE.

Petitioner's primary argument, that government should not be able to "evade" heightened judicial scrutiny of land use regulations by adopting such regulations legislatively rather than in an individual, adjudicative context (Petition at 11-12), trivializes this Court's takings jurisprudence. The issue is not whether government is evading "searching judicial scrutiny" by acting legislatively; the issue is whether the regulation at issue presents a heightened risk of an extortionate use of the police power to exact unconstitutional conditions. This Court's takings cases make clear that such risk does not exist when the use of the police power involves no more than the legislative adoption of generally applicable limitations on the use of property, and does not require a dedication of land.

The very term "heightened scrutiny," of course, assumes that there exists a baseline level of scrutiny which is lower. Under such normal, "baseline" review, land use regulations constitute an exercise of the police power to which courts, as a general matter, defer. Commencing with *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), courts have recognized that the police power is not a circumscribed prerogative, but is elastic, capable of expanding to meet the changing conditions of modern life. *See also Agins*, 447 U.S. at 260-63; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124

(1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974). Consequently, courts afford great deference to legislative exercises of the police power. The determination of the necessity and form of regulations enacted pursuant to the police power is primarily a legislative, not judicial, function, tested in the courts not by what judges may think of the wisdom or necessity of a particular regulation but solely by whether any reasonable basis exists for the legislative determination. If the validity of the legislative enactment is fairly debatable, the legislative judgment will not be disturbed. *Euclid*, 272 U.S. at 388. Courts "do not sit to determine whether a particular housing project is or is not desirable," but defer to cities' purely legislative prerogative to adopt zoning and land use ordinances that address not only the physical and aesthetic attributes of a community, but also its socio-economic balance. *Village of Belle Terre*, 416 U.S. at 4-6. The burden thus properly rests with the party challenging a generally applicable exercise of the police power to prove that it is clearly arbitrary, having no reasonable relation to the public health, safety, morals, or general welfare. *See Dolan*, 512 U.S. at 391 n.8; *Agins*, 447 U.S. at 260.

Therefore, the City's Inclusionary Ordinance must be upheld if any reasonable basis for its adoption exists. Under such minimal scrutiny, the City need not demonstrate an essential "nexus" or "rough proportionality" between the Ordinance and new residential housing development. Rather, the Ordinance may be justified by the general public need for affordable housing, the limited amount of available land within the City's boundaries, and the exacerbation of the affordable

housing crisis by the development of market-rate housing. This Court has recognized only a narrow class of cases justifying a more careful, intermediate, non-deferential review.

In *Nollan v. California Coastal Comm'n*, the Court struck down permit conditions requiring the dedication of a lateral access along beachfront property, and in so doing established the "essential nexus" test, the first prong of what has come to be known as "heightened scrutiny." Yet contrary to Petitioner's suggestion, the Court did not hold that heightened scrutiny applies to all land use regulations, exactions, or conditions, irrespective of their nature or method of imposition. Rather, in *Nollan* the Court repeatedly emphasized its concern that an adjudicative process not be used to leverage or "extort" a dedication of land as a condition for the issuance of a permit to an individual property owner. 483 U.S. at 832-34.

Similarly, in *Dolan v. City of Tigard*, in which the Court established its "rough proportionality" rule as the second prong of heightened scrutiny, the conditions at issue were not land use restrictions (i.e., zoning), but were dedication requirements imposed on an individual permit applicant. In invalidating the ad hoc land dedication condition imposed on Mrs. Dolan, the Court expressly distinguished those cases involving "essentially legislative determinations classifying entire areas of the city" and imposing "simply a limitation on the use" of property, from cases involving "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" on "a requirement that [the owner] deed portions of the property to the city." 512 U.S. at 385.

Most recently, the Court again confirmed the limits of heightened scrutiny under *Nollan* and *Dolan* in *City of Monterey v. Del Monte Dunes*. There, the Court unanimously overruled the Ninth Circuit's application of *Dolan* to a city's repeated adjudicative denials of an individual property owner's development proposal. In so doing, the Court stated "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions," which the Court defined as including "the dedication of property to public use" and "dedications demanded as conditions of development." 526 U.S. at 702-03.[10]

In contrast to cases of individualized exactions, when, as here, an ordinance applies to "a large number of parcels," there are "assurances against arbitrariness." *Penn Central*, 438 U.S. at 135 n.32; *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). What is more, while mere restriction on the use of property, by traditional zoning or other economic regulation, has always been judged deferentially under a relaxed standard of review (*see, e.g.*,

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[10] Similarly, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five justices agreed that the Takings Clause does not even apply to governmental actions that simply impose a financial obligation upon a party without affecting an identified property interest. *Id.* at 540-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 544-56 (Breyer, J., dissenting).

Euclid, 272 U.S. 365), actual land dedication conditions implicate the most fundamental of constitutional protections, namely, the right to exclude others from private property and to receive just compensation when forced to actually deed property to the government (*Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 831-32).

Because Napa's Ordinance was legislatively adopted, is broadly applicable to all property citywide,[11] and requires neither the dedication of property nor payment of money, none of the potential abuses and risks underlying the application of heightened scrutiny exist. Under the Ordinance's core inclusionary requirement, ownership of every unit in a proposed development, including the ten percent affordable units, remains with the private property owner. This classic land use limitation, even in its most extreme application, merely restricts the use of ten percent of a project's units while allowing generous financial incentives to offset such restrictions. The Court should decline Petitioner's invitation to broaden the application of heightened scrutiny under such plainly inapplicable circumstances.

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[11] Petitioner's assertion that the Ordinance is targeted to specific landowners (i.e., residential developers) is simply wrong. The Ordinance applies to every property in the City, whether developed residentially or commercially. Pet. App. at G-18 to G-28, G-29 to G-39. In any event, however, this Court has rejected similar arguments that land use ordinances lack uniformity of application simply because they apply to a class of persons or properties. *See Penn Central*, 438 U.S. at 132.

II. THE STATE AND FEDERAL DECISIONS CITED BY PETITIONER DO NOT CONFLICT WITH THIS COURT'S DECISIONS.

Seeking to manufacture a basis for review under Rule 10, Petitioner argues that "the holdings of several states confirm that generally applicable, legislative enactments are subject to the standards established in *Nollan* and *Dolan*." Petition at 13-17. In reviewing these decisions, however, Petitioner either ignores their context, namely, that the condition or exaction at issue in fact required actual land dedication, or disregards their vintage, namely, that the case either was decided before *City of Monterey v. Del Monte Dunes* or was subsequently disapproved. We discuss these decisions in the order presented by Petitioner.

New York: Petitioner cites two cases, *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). Both cases, however, were decided prior to this Court's decision in *City of Monterey*. The New York high court thus no longer follows them. *See, e.g., Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000).

Ohio: While in the decision cited by Petitioner, *Home Builders Ass'n of Dayton v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000), the Ohio Supreme Court applied heightened scrutiny under *Nollan/Dolan* to a legislatively-imposed traffic impact fee, the impact fee at issue was imposed in most instances in lieu of street dedication requirements. Such a fee is nothing like the Ordinance

here, which simply limits use of a small percentage of a development project and allows (but does not require) a fee as an option to developers. Moreover, the decision appears to have overlooked this Court's limitation in *City of Monterey* on the application of *Nollan/Dolan* to land dedication requirements. Review by this Court is not warranted on the speculative assumption that Ohio's courts may continue to ignore *City of Monterey* in future cases.

Oregon: Petitioner cites *J.C. Reeves Corp. v. Clackamus County*, 887 P.2d 360 (Or. App. 1994), and *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. App. 1994). However, both cases involved the adjudicative imposition of land dedication requirements on individual property owners, as in *Dolan*. They do not, as Petitioner suggests, stand for the broader proposition that heightened scrutiny applies to generally applicable land use legislation that requires no land dedication.

Washington: *Sparks v. Douglas County*, 904 P.2d 738 (Wash. 1995), and *Trimen Dev. Co. v. Kings County*, 877 P.2d 187 (Wash. 1994), also fail to support Petitioner's position. *Sparks*, as Petitioner acknowledges, involved a dedication. Although *Trimen* involved an in-lieu fee, that fee was itself required as an alternative to land dedication. Both cases thus square with *Dolan*.

Illinois: The two Illinois cases cited by Petitioner, *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), and *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1995), *cert. denied*, 519 U.S. 976 (1996), are similarly unavailing. Although the *County of Du Page* decision involved a fee, it was

decided well before this Court's decisions in *City of Monterey* and *Eastern Enterprises*. There is no indication that the Illinois courts, like New York's courts, will not limit future rulings. Moreover, the decision in *Amoco Oil Co.* involved the imposition of a land dedication requirement and thus is consistent with *Dolan* in that respect.

First Circuit: Petitioner's citation to the decision in *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), also fails to suggest any conflict in this Court's application of heightened scrutiny. First, the case did not involve a legislatively-adopted inclusionary or fee requirement. Rather, it again involved the kind of ad hoc, adjudicative requirement found objectionable under *Nollan/Dolan*. Specifically, the City of Portsmouth required an individual developer to pay a fee negotiated solely with the developer as leverage for a permit. Second, *Schlesinger* was decided before this Court's decision in *City of Monterey*. Again, this Court should not join in Petitioner's assumption that the First Circuit – or any other court – will ignore that decision prospectively.

In sum, the cases cited by Petitioner fail to demonstrate any conflict justifying review under Rule 10.

III. PETITIONER'S ARGUMENT THAT ITS FACIAL CLAIM IS NOT "UNRIPE" DISREGARDS THAT THE COURT OF APPEAL CONCLUDED NOT ONLY THAT THE ORDINANCE CAN BE WAIVED, BUT THAT IT SATISFIES *AGINS'* "SUBSTANTIALLY ADVANCE" STANDARD.

Petitioner urges that the court of appeal erred by disregarding *Agins'* first (substantially advance) prong,

ruling instead that Petitioner's facial attack was "unripe." Petition at 21-25. The court of appeal did no such thing and, in fact, never uttered the word "ripe" in its decision. Rather, the court of appeal preliminarily concluded that, in light of the Ordinance's administrative "relief valves" and waiver provision, this case presented the type of abstract and hypothetical claim over which the courts regularly deny anticipatory review because further administrative implementation of the Ordinance may reduce or avoid constitutional problems, or change the nature of the issues presented.[12] The court then proceeded to analyze the Ordinance under *Agins*, expressly concluding that the Ordinance substantially advances the City's legitimate governmental interest in creating affordable housing. Pet. App. at A-6 to A-10. That conclusion, ignored by Petitioner, presents no important question of law – it is consistent with the settled authority of this Court.

By miscasting the court of appeal's opinion as an improper "ripeness" decision, Petitioner attempts to evade the "uphill battle" confronting its facial challenge.

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[12] This case is not analogous, as Petitioner suggests, to a case involving a suspect classification or a case in which the only constitutional application of the regulation is by waiver of the regulation. Petition at 22. In this case, the waiver provision is not necessary to the constitutional application of the Ordinance. The court of appeal concluded, based on the record herein and the applicable standard of review, that the Ordinance could be applied constitutionally even in the absence of a waiver. Pet. App. at A-6 to A-10. As the court noted, the waiver merely is available in those cases in which the application of the Ordinance would yield an unconstitutional result under *Agins'* second prong addressing economic impacts. *Id.* at A-4.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987). Indeed, Petitioner's argument that there is no circumstance in which the Ordinance can be applied lawfully, because the construction of residential housing in no way exacerbates any shortage of affordable housing (Petition at 23), not only persists in advocating the wrong procedural and constitutional standards, it ignores the City Council's legislative findings to the contrary.

Procedurally, Petitioner is wrong that the complaint's allegation that every application of the Ordinance is unconstitutional must be accepted as true. Petition at 24. On a facial challenge, the question whether an unconstitutional application of a regulation can be avoided is not governed by the conclusory allegations of the complaint. Rather, it turns upon the court's appraisal of the legal effect of the regulation. *Agins*, 447 U.S. at 259 n.6; *Keystone*, 480 U.S. at 494-96.

Constitutionally, Petitioner's argument that there is no circumstance in which the Ordinance can be applied lawfully, because (Petitioner unilaterally concludes) the construction of residential housing in no way exacerbates any shortage of affordable housing, is based upon the erroneous application of the *Nollan/Dolan*. The City has established above that those standards do not apply to the Ordinance. Under the correct standard of review, a determination of the necessity and form of regulations enacted pursuant to the police power is a legislative, not judicial, function, tested in the courts not by what judges may think of the wisdom or necessity of a particular regulation, but solely by whether any reasonable or fairly debatable basis exists for the legislative determination. *Euclid*, 272 U.S. at 388.

But Petitioner not only misapprehends the correct standard of review, it continues to ignore the record below. The courts below took judicial notice, without objection, of nearly 700 pages of reports, studies, and other materials. Pet. App. at A-4. Based on that evidence, the City found, among other things, that there is a limited supply of developable land in the City, that new market-rate housing absorbs the scarce remaining supply of land available for affordable housing[13] and increases land prices, and that new market-rate housing contributes to the demand for goods and services in the City, increasing local employment at wage levels which often do not permit employees to afford housing in the City. Pet. App. at G-6 to G-9.[14] In light of these legislative findings,[15] the court of appeal was not required to accept Petitioner's bare, contrary conclusion that market-rate housing could never exacerbate the shortage of affordable housing. Rather, the court of appeal properly concluded as a

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[13] The scarcity of land capable of development for affordable housing is one of the classic justifications for inclusionary and affordable housing linkage fee requirements. *See, e.g., Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277, 285 (N.J. 1990); Padilla, *supra*, 23 Hofstra L. Rev. at 544.

[14] This finding is similar to the finding upon which an affordable housing "linkage fee," imposed on new commercial development, was upheld in *Commercial Builders v. City of Sacramento*, 941 F.2d at 873.

[15] Such findings, of course, are presumed correct and factually supported. *See, e.g., Standard Oil Co. v. City of Marysville*, 279 U.S. 582, 586 (1929). Not once in this litigation has Petitioner even mentioned, let alone challenged, either the existence of, or the factual support for, the City Council's legislative findings.

matter of law that Petitioner could not establish that the City's determinations were clearly arbitrary and without reasonable relationship to the public health, safety, morals, or general welfare.

Fundamentally, Petitioner's arguments are irreconcilable with this Court's seminal decision in *Penn Central Transp. Co. v. New York City*. In *Penn Central*, it mattered not whether the perceived problem was created by past city policies (as Petitioner complains here), or whether the proposed development caused the problem or was even beneficial. Indeed, the landmark preservation ordinance was enacted to address problems created by past city policies that allowed destruction of historic properties. 438 U.S. at 108. Consequently, it was insufficient below, and is insufficient here, for Petitioner to merely allege that there are no circumstances in which the Ordinance can be lawfully applied because the construction of residential housing in no way exacerbates any shortage in low-income housing. The City found differently on the basis of an unchallenged record. The constitutional validity of its actions turn merely on whether those findings, and the City Council's legislative judgment, were debatable. Courts do not sit in judgment of such legislative decisions, which necessarily balance and adjust local planning and the economic consequences which follow. Nor is there constitutional mandate for the proposition, urged by Petitioner, that cities must require growth and urban sprawl willy-nilly in order to justify a modest land use restriction to provide housing for all segments of economic society.

IV. THE COURT OF APPEAL CORRECTLY REFUSED TO APPLY THE "FAIR RETURN" STANDARD FOR THE FIRST TIME TO A LAND USE REGULATION AND TO REACH A DECISION ON THE APPLICATION OF ORDINANCE PROVISIONS WHICH HAVE NOT BEEN APPLIED.

Petitioner's final argument is that the Ordinance's inclusionary requirement, on its face, may deprive future owners of a multi-family rental development of a "fair return" on the ten percent of the development's units which are required to remain affordable. Yet, while Petitioner objects that the court of appeal misconstrues the nature of its due process claim (Petition at 27), the court of appeal simply refused to extend, for the first time, the "fair return" standard to local land use regulations. As the court of appeal noted, no authority exists for the proposition that local governments are required to assure developers a "fair return," or a profit in any form. The court correctly found no justification to make new law in this case – particularly when it cannot be determined on this facial challenge how, or if, the Ordinance's future affordability conditions will be applied. Petitioner demonstrates no basis to justify this Court's review of that decision under Rule 10.

The "fair return" concept originated in railroad and utility regulation (*see Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942)), where it applied to owners of fixed assets whose revenue from the continued operation of those assets was regulated. The "fair return" standard subsequently was extended to rent control, which made apartment owners, like utilities and

railroads, the owners of assets in place whose operating revenues are regulated. *See, e.g., Pennell v. City of San Jose,* 485 U.S. 1. No case, however, has applied a "fair return" analysis to land use regulations governing new development. Of course, the reason is that the development of property involves both the possibility of profits far in excess of a "fair return" on the one hand, and a calculated risk of economic loss on the other. The benefits and burdens of local land use regulations have been part of this balance of risk and reward dating back, at least, to *Euclid v. Ambler Realty Co.,* in which the Court upheld the constitutionality of local zoning.

Local government is not obligated to adjust its zoning to permit greater profits to new development in the name of a "fair return." Indeed, under California law developers have no recognizable property interest to develop property which would give rise to a "fair return" right. Because development proposals require discretionary city approval (either of a use permit or tentative map), they represent only a unilateral desire by the property owner/developer and not a "legitimate claim of entitlement to a benefit." *Breneric Assocs. v. City of Del Mar,* 69 Cal. App. 4th 166, 181-84, 81 Cal. Rptr. 2d 324, 334-36 (1998); *Clark v. City of Hermosa Beach,* 48 Cal. App. 4th 1152, 1180-84, 56 Cal. Rptr. 2d 223, 240-42 (1996), *cert. denied,* 520 U.S. 1167 (1997). For these reasons, the court of appeal correctly "doubted" the viability of Petitioner's due process "fair return" claim. Nevertheless, even assuming that such right to a "fair return" existed, the court also correctly concluded that consideration of such a claim was premature.

Ignoring this, Petitioner below complained that the Ordinance does not guarantee a "fair return" on investment to developers because no consideration is given in the Ordinance to how much it will actually cost to develop the affordable units. Pet. App. at A-12 to A-13. While Petitioner now refocuses its novel claim on the subsequent landlord who allegedly has no resort to the administrative relief provisions of the Ordinance (Petition at 27-30),[16] the court of appeal correctly concluded that Petitioner's due process claim was premature. Indeed, that conclusion is even more apt if the allegedly aggrieved party is a subject landlord and not the present developer. The question is not, as Petitioner urges, whether an administrative relief procedure will be available to a subsequent landlord; the question is whether it is possible to know exactly how, or even *if*, the Ordinance's long-term affordability provisions will be applied. The court of appeal concluded that it was not possible because there are alternatives available, including an in-lieu fee, which avoid the future affordability provisions altogether. There are also provisions to "reduce, modify or waive" the Ordinance's requirements. Pet. App. at G-40.[17] In addition, the

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[16] For purposes of this Brief, the City assumes but does not concede that Petitioner, an association of "builders, contractors, and related trades and professions" (Pet. App. at A-4), has standing to raise the claims of subsequent landlords. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *cf. Pennell v. City of San Jose*, 485 U.S. at 6-7.

[17] These features, of course, further distinguish the Napa Ordinance from rent control and other forms of price controls to which due process "fair return" standards do apply. Unlike the Ordinance here, no rent control law of which the City is aware

Ordinance provides that the future affordability provisions, *if any*, will be implemented through regulatory agreements recorded against the affected parcels. Pet. App. at G-40. Of course, Petitioner's contention that landlords' rights, if any, to a "fair return" will not be protected is speculative and premature since no such regulatory agreements are before the Court. In light of this record, and in accord with well-settled authority, the court of appeal properly held that Petitioner could not sustain a facial due process challenge on the basis of facts that do not, and may never, exist.

CONCLUSION

The City respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: February 19, 2002.

Respectfully submitted,

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permits a landlord to wholly and voluntarily "opt out" of the control by paying an in-lieu fee.